serving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for the purpose of fishing in any water containing fish that have been planted therein by the state; provided, that the legislature may by statute provide for the season when and the conditions under which the different species of fish may be taken."[2]

Together with this section there also stands one adopted in 1902, as follows: "The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein, as it may deem appropriate to the respective districts."[3]

In the matter of the Application of A. Parra for a writ of Habeas Corpus,[4] the District Court of Appeal, in the Third District, has to consider whether the Fish and Game Act of 1909,[5] amended in 1913,[6] by imposing a license tax of $10 per annum for fishing for profit in the waters of the state, does not contravene section 25 of article I of the constitution. The court believes that the principal object of this section of the constitution was to preserve to the people the right to fish upon the public lands of the state and to require that grants of land by the state should not be made "without reserving to the people the absolute right to fish thereupon". It believes, further, that the imposition of a license tax has a tendency to protect the fish and prevent their extermination, and is authorized by section 25½ of article IV. The court, therefore, says: "That the imposition of a license tax of $10 per annum for the privilege of fishing in the waters of the state for profit is a reasonable tax, we are satisfied. The food fishes caught in those waters have an annual value running into millions of dollars and furnish the means of livelihood to thousands of our citizens. Large sums are expended annually by the state to maintain the propagation of our food fishes and to prevent the decrease of the supply. It is but fair that those who profit by these laudable and paternal efforts of the state should contribute something towards their cost, and this license is, from the nature of the business, the only tax which can be imposed to aid in the protection of this important industry." W. C. J.

CONSTITUTIONAL LAW: THE EXTENT OF THE POWER OF EMINENT DOMAIN.—While it is well established that the power of eminent domain can be exercised for a public purpose only, there is a conflict of view as to what constitutes a public purpose. The

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[2] Cal. Const., art I, § 25.
[3] Cal. Const., art. IV, § 25½.
[4] (April 14, 1914), 18 Cal. App. Dec. 539.
[5] Cal. Stats. 1909, p. 302.
[6] Cal. Stats. 1913, p. 985.

question is now being raised in a new form by the attempts of state legislatures to authorize the condemnation of private property by individuals or corporations for the purpose of carrying on their business of developing the natural resources of the state. As was pointed out in a previous note,[1] the Supreme Court of Washington has held[2] that the importance to the public that the timber of the state be developed is sufficient to render the enterprise of developing and marketing the timber a public one, and that therefore the statute authorizing the condemnation of a private right of way across private land for the purpose of constructing an outlet to timber-land, otherwise inaccessible, is constitutional. But in the case of *Anderson v. Smith-Powers Logging Company*,[3] in which the defendant had condemned land under a similar statute,[4] the Supreme Court of Oregon held that the fact that a logging railroad may be used as a means of getting logs to market and thereby developing the timber of the state is not of sufficient importance to the public to justify an exercise of the power of eminent domain. The court says, "Every legitimate business to a greater or less extent, indirectly benefits the public by benefiting the people who constitute the state, but that fact does not make such enterprises public business."

As a means of accomplishing the result sought by the statute, the court suggests an amendment to the state constitution. But this raises the question whether such an amendment in effect declaring that to be a public use which the Oregon court holds to be a private use, would violate the fourteenth amendment of the federal constitution.

The case of *Union Lime Company v. Chicago and Northwestern Railway Company*,[5] decided in the Supreme Court of the United States, holds that private property taken for the extension of a spur track ordered by the state Railroad Commission is not taken for private use contrary to the fourteenth amendment. The ground of this decision is that, while the extension may be for the present benefit of a single industry which is to bear the initial cost, the state courts have justified the taking because the track, upon an equitable division of the initial cost, is to be at the service of the public and will constitute an integral part of the railroad system. Further than this the United States Supreme Court has not yet gone.

H. C. K.

A somewhat analogous question has arisen in the Superior Court of Kern County, California, in the case of Miller and Lux v. Kern County Land Company. The following opinion was delivered by Judge Farmer:

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[1] 2 Cal. Law Rev. 318.

[2] State ex rel. Mountain Timber Co. v. Superior Court (1914), 137 Pac. 994.

[3] (Mar. 17, 1914), 139 Pac. 736.

[4] Lord's Oregon Laws, § 6307.

[5] (Apr. 6, 1914), 34 Sup. Ct. 522.

"The principal point presented in this matter and the only one argued by counsel on the demurrer, is one of transcendent importance to the people of this county and of this state. The question is:

"May a private person or corporation condemn a right of way across private property for a necessary irrigation ditch when such irrigation is to be applied to its own individual use. That is, no element of common use by a portion of the public is sought.

"Prior to the passage of the act of 1911 (Stats. 1911, p. 1407) eminent domain proceedings could not be so employed (Thayer v. California Development Company 164 Cal. 117-126). The act referred to reads in part as follows:

" 'Irrigation in the state of California is hereby declared to be a public necessity and a public use, and the power of eminent domain may be exercised on behalf of such public use in accordance with the provisions of Title VII, Part III of the Code of Civil Procedure . . . .' "

"It is contended by defendants that the statute is not to be construed to mean that an individual user may condemn for his personal use without any dedication to the public, or, if it is so to be construed, that the act itself is unconstitutional. In view of the fact that for many years prior to 1911 condemnation proceedings were authorized by subd. 4 of sec. 1238 of the Code of Civil Procedure, ... 'for canals, ditches . . . . flumes, aqueducts and pipes for irrigation . . . . supplying . . . farming neighborhoods with water,' it must be assumed that the legislature intended in passing the act of 1911 to broaden the purpose for which such procedure may be had. And, in further view of the unlimited character of the language there employed, and the fact that such act was passed after the supreme court had repeatedly held that an individual could not invoke section 1238 C. C. P. for his personal use alone, it is my opinion that reasonable construction of the statute includes the present purpose.

"Is such act constitutional?

"It is admitted everywhere that the question of public use is ultimately a judicial one, that is, the legislature cannot make a use public by declaring it so, although its declaration will be respected by the courts, unless it is palpably without reasonable foundation. (San Mateo v. Coburn 130 Cal. 631; Lewis Eminent Domain 3d Ed. sec. 251.) We must inquire then judicially whether the adopted interpretation of the act of 1911 is constitutional.

"Our constitution offers little aid to us. Art. I, sec. 14 contains no authorization expressly for the proceeding sought, and it contains no definition of the term 'public use.' That term is defined in two ways by courts of last resort—'one holding that there must be a use or right of use on the part of the public or some limited portion of it; the other holding that they (the words "public use") are equivalent to public benefit, utility or advantage' (See Lewis Eminent Domain 3d Ed. sec. 257 and cases cited.)

The supreme court of this state has heretofore preferred the former definition, and if its former definitions of 'public use' and 'public necessity' were to be applied to this act of 1911, it is hard to conceive how this interpretation of the act of 1911 can be sustained. But we like rather to think that the former definitions of these terms will no longer be applied to matters of irrigation. We like rather to think that the legislature was here acknowledging what courts must take judicial notice of, that in this state irrigation itself is a matter of such fundamental and general importance to this commonwealth in the promotion of public interest and in the development of the state's natural resources that the courts here will say as was said by the Supreme Court of the United States in Clark v. Nash 198 U. S. 361, that in this particular case the public interest is so great that the taking by a private user is a matter of public necessity and public use. That in this case, use by the general public is an inadequate test as to what constitutes a public use. (Strickley v. Highland Boy G. M. Co. 200 U. S. 527). See Lux v. Haggin 69 Cal. 255, in which the question is raised in the dictum of the court and expressly left undecided. (Wiel Water Rights in Western States 3d Ed. Sec. 607-613).

"It is recognized that this view is something of a departure from common law principles and from the condition of our law in California prior to 1911, but it is a departure supported by precedent in the other Western States where irrigation is of similar importance and a departure that as to these states in the matter of irrigation has found the approval of the Supreme Court of the United States: finally, it is a departure which in my opinion finds abundant justification in this state where great areas of dry lands abound, valueless, undeveloped, awaiting only irrigation to cause them to yield up wealth to the entire commonwealth.

"Let the demurrer be over-ruled, with twenty days to answer. Dated, May 23d, 1914.

MILTON T. FARMER, Judge."

CORPORATIONS: LIABILITY FOR TORT WHILE ENGAGED IN ULTRA VIRES TRANSACTIONS.—Long after the courts recognized the liability of corporations for torts committed in the business for which they were incorporated, no such liability was imposed if the tort resulted from an *ultra vires* undertaking, unless such undertaking had been assented to by the stockholders.[1] In England this assent, in order to be binding, was required to be in the form of a supplemental deed or certificate executed by all of the stockholders.[2] In the United States assent was presumed if the stockholders had

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[1] Brokaw v. New Jersey R. R. and Trans. Co. (1867), 32 N. J. Law 328, 90 Am. Dec. 659.

[2] Re Phoenix Life Assurance Co. (1862), 2 J. & H. 441, 70 Eng. Rep. R. 1131.